

Nos. 8587-~~8588~~.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA.

CHARLES LUX ET AL.

Appellants,

vs.

JAMES B. HAGGIN ET AL.

Respondents.

PETITION FOR A REHEARING.

GARBER, THORNTON & BISHOP,

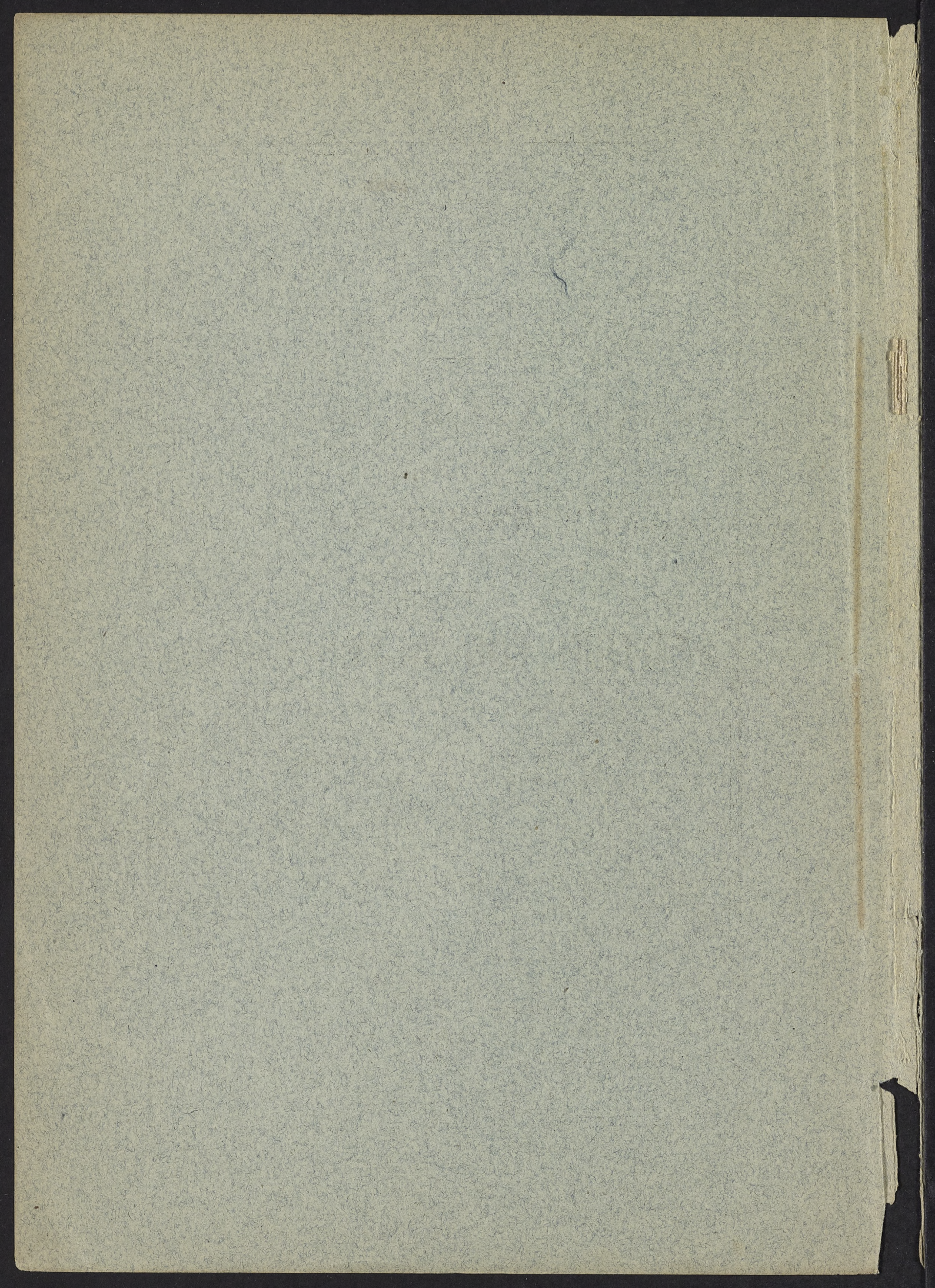
Of Counsel for Petitioners.

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PETITION FOR A RE-HEARING.

We respectfully petition for a re-hearing in this cause.

The questions involved are so numerous and important, and the record and briefs so voluminous, that it is not strange if the learned Judges of this Court have overlooked, as we respectfully submit they have, questions vital to the cause, which, when properly considered, must necessarily compel an affirmance of the judgment of the Court below, independent of the question of riparian law discussed in the opinions.

Besides the interests involved are of such magnitude, not only as between the parties themselves, but also as to thousands of others, and the result reached so disastrous to the defendants, so destructive to the vast and beneficial improvements made by them in good faith, and in the belief that the same law as to those matters applied both

to the State and Government lands in California ; so disastrous to the people of a large part of California, and so destructive of all those great interests which have grown up under the irrigation systems based upon the doctrine of appropriation to beneficial uses—that we firmly believe your Honors will wish, even if in the end you feel compelled to adhere to the views already expressed, to do so only after you have permitted argument to be exhausted upon the subject, and have received all the light which the profession can give. No matter how onerous and pressing the duties which devolve upon your Honors, there is, we submit, before you no question or business which can compare in public interest to the inquiry whether the decree shall stand which condemns to absolute barrenness the thousands of acres of land reclaimed from the desert by the vast expenditures of the defendants here, and now a garden of productiveness and beauty, in obedience to the law of another country, based upon its customs, and arising under conditions the most diverse from ours—whether in obedience to that law, a large part of this State, after a progress almost unparalleled and improvements made at incalculable cost of labor and treasure, is to be condemned to return to sterility and unproductiveness ; whether in obedience to that law the wheel of progress is to be turned back, and the present prosperity of thousands changed into ruin and poverty, that a few men who happen to own land on the banks below may enjoy the pleasure of seeing the stream flow as it was accustomed to flow. Your Honors will not, we are sure, forget that this decree, if it is to stand, not only overthrows the progress of the past, but puts a perpetual bar upon future progress and development. For if the pur-

chase of the smallest sub-division of land on a stream below gives riparian rights, overthrows the settled policy of the State, and changes its laws, no man will venture to expend a dollar in turning water, which is the life-blood of California, upon her comparatively waterless lands.

We shall first call your Honors' attention to some of those matters which we claim entitle the respondents to an affirmance of the judgment at all events, and without regard to riparian law—matters which were unnoticed in any of the opinions, although fully discussed in the briefs. A notable instance of this is the entire omission of any discussion of the question, to which many pages of our briefs were devoted, as to whether or not the evidence offered in rebuttal and rejected by the Court below was proper rebutting evidence; and if not, as to whether or not its rejection was an exercise of discretion by the trial Court which could not be made a ground of reversal unless an abuse of that discretion could be shown. We are persuaded that if this point had not escaped notice in the sea of argument in which it was immersed, and if it had been distinctly presented to the mind of the Court, it would not have been passed over in silence, or with a mere casual reference to it, especially as the supposed errors in admitting that testimony furnished the *only* ground for the judgment of reversal. Without further preface we proceed to indicate the reasons why we think a re-hearing should be granted.

I.

The rejection of the evidence offered by the plaintiffs in rebuttal was not error, because the evidence was not proper rebutting evidence, and because part of it was not competent, even as original evidence, under the pleadings.

This is a vital point in this case. Indeed, the rejection of this alleged rebutting evidence is the distinct ground, and the only ground, upon which the majority of the Court put the reversal of the judgment of the Court below. Whatever may be the correct view of the Law of California as to the right to acquire property in the water of a stream not wholly upon public lands, by mere priority of appropriation, it is conceded by both the learned Judges who delivered opinions in favor of reversal, that unless the plaintiffs had title to the lands claimed by them at the time of the institution of the proceedings for appropriation of the water of Kern River by the defendants' grantors, and unless there is a real water-course through or upon those lands, constituting a part of Kern River, the plaintiffs must fail, and the judgment must be affirmed. The evidence offered and rejected was upon these points. That evidence consisted of two distinct parts:

1. The evidence of the certificates offered to show title to the lands at the date of the appropriation.
2. The parol evidence offered to show that there was a watercourse at certain points upon those lands, where the defendants had undertaken to show that there was none. We maintain that the evidence offered on both these points was incompetent at the time when it was offered, and that the rejection of it was not error.

1. *The evidence of the certificates was not proper rebutting evidence, and was therefore inadmissible except in the discretion of the trial Court, upon good cause shown.*

We are not left to the uncertain light of authority to determine whether or not evidence, which really constitutes a part of the original case of a plaintiff or defendant, may be withheld until the adverse evidence is put in, and then may be offered in rebuttal. The code expressly provides that the respective parties shall, in turn, introduce the evidence constituting their ground of action or defense, and that afterwards neither of them shall introduce any but rebutting evidence, "unless the Court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Cal. Code of Civ. Proc., Sec. 607. This rule of the Code is merely an affirmance of a doctrine as old as common law procedure, that a party, after concluding his original case, cannot, as a matter of right, introduce further evidence by way of cumulation which is not rebutting in character, but is, in reality, part of his original case, and cannot assign the rejection of such evidence as error giving ground for reversal. The decisions sustaining and illustrating this doctrine, either under codes substantially like ours, or upon general principles of common law practice, are exceedingly numerous: *Kohler v. Wells*, 26 Cal. 613; *Ahrens v. Adler*, 33 Id. 608; *Phelps v. McGloan*, 42 Id. 300; *Hathaway v. Hemmingway*, 20 Conn. 195; *Hubbell v. Ream*, 31 Iowa 289; *Boals v. Shields*, 35 Id. 233; *Hess v. Wilcox*, 58 Id. 383; *York v. Pease*, 2 Gray, 282; *Holbrook v. McBride*, 4 Id. 218; *Chadbourn v.*

Franklin, 5 Id. 314; *Macullar v. Wall*, 6 Id. 507; *Briggs v. Humphrey*, 5 Allen, 316; *McHugh v. Butler*, 39 Mich. 185; *Foye v. Leighton*, 2 Fost. (N. H.) 75; *Leland v. Bennett*, 5 Hill, 288; *Marshall v. Davies*, 78 N. Y. 419; *Storey v. Sanders*, 8 Humph. 663; *Pingry v. Washburn*, 1 Aik. 264; *Brown v. Murray*, Ry. & M. 254; *Jacobs v. Tarleton*, 11 Q. B. 419. Most of these cases are cited in the respondent's brief, pp. 5-15, and are there fully stated, with copious quotations from the opinions.

Under the rule laid down in the code and in these authorities, if the evidence of these certificates constituted part of the plaintiff's original case, or if it was not in rebuttal of new matter brought out by the defendants, the plaintiffs could not insist upon its admission as matter of right, but could introduce it only by permission of the Court duly granted "for good reason." The test by which to determine whether or not it was part of the plaintiff's original case is this: Did it tend to support an issue upon which the plaintiffs had the burden of proof? "When, by the pleadings," say the Court in *Hathaway v. Hemmingway*, 20 Conn. 195, "the burden of proving any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his claim. He cannot, as said by Lord Ellenborough, go into half his cause and reserve the remainder. *Rees v. Smith*, 2 Stark Cas. 31: *Rex v. Beezely*, 4 Car. & P., 220; *Brayden v. Goulman*, 1 Mon. (Ky.) 115; *Rex v. Stimpson*, 2 Car. & P., 415; *Knapp v. Haskell*, 4 Id. 590." Now what was the principal issue directly and affirmatively tendered by the complaint and met by the general denial in the answer? It was

the plaintiffs' title to the land. The allegation of title was not general but specific. It was an express allegation of title, under a grant from the State pursuant to the Swamp Land Act. Conceding for the present that the allegation of the origin of this title was not limited as to time (though as a matter of fact it *was* so limited) it was clearly incumbent upon the plaintiffs to produce, in the first instance, the *whole* of their evidence of title under the Swamp Land Act. If these certificates were admissible at all, they could only be so because they constituted a step in that title. They were, if anything, evidence of title which the patents ripened into a complete estate in fee. Certainly, then, upon the most favorable view for the plaintiffs, in introducing their patents in the first instance, and holding back their certificates for rebuttal, they were endeavoring to do the very thing which the rule relating to rebutting evidence was designed to prevent. They were seeking to prove their title piecemeal. A moment's consideration is sufficient to demonstrate that such a proceeding is not to be tolerated. Suppose that these certificates had been admitted, the defendants must have been allowed upon the same principle to rebut them, by showing a still earlier appropriation of the water. The plaintiffs must then have been allowed to rebut by introducing another batch of certificates of still earlier date. And so the parties might have gone on with rebuttals and counter-rebuttals for a quarter of a century, until, in fact, the title was traced to its ultimate source in the Government. A trial conducted upon such principles would degenerate into something very like a farce.

It seems to us too plain for serious argument that these

certificates, constituting, as they do, if they have any value, a link in the chain of title under which the plaintiffs claim and upon which they have specially declared, they cannot be allowed to withhold them upon the introduction of the other links in that title, and to insist upon their admission in rebuttal. They were part of the plaintiffs' original case, the burden of proving which was upon them from the outset. If they withhold the certificates, and rely upon the patents only in the first instance, they could upon the same principle introduce the certificates first and withhold the patents, and after we had invalidated the certificates, offer the patents in rebuttal. That would be somewhat like the case of *Leland v. Bennett*, 5 Hill, 288, where a plaintiff in ejectment introduced a controller's deed as evidence of his title, and after that had been shown to be void, sought to prove in rebuttal a title by foreclosure of a certain mortgage against the defendant. The evidence was rejected as not proper in rebuttal, and this ruling was held right on error. See page 12 of the respondents' former brief.

The withholding of the certificates in this case was all the more improper from the fact that the plaintiffs had distinct notice from the defendants' answer that the appropriation of the water antedated the patents. They knew when they rested their case that something more than the patents was required to defeat the appropriation, and that they must show their entire chain of title. There is, therefore, no excuse on the score of surprise for their failure to produce the certificates.

But we are not required to rest upon the undoubted proposition that *prima facie* the burden of proving their title, and the whole of it, rested upon the plaintiffs at the

beginning of the trial, and that these certificates were a part of their evidence of that title. Even if it were true that they were not bound in the first instance to do more than produce their patents, they voluntarily assumed the burden of showing title antedating their patents. They introduced a conveyance of the lands by Baker and others, dated two years before the certificates, and offered evidence to show possession thereunder. This was plainly intended to anticipate the defendants' proof of an appropriation between the date of that conveyance and the date of the patents. Now it is clearly settled by undoubted authority, that where a plaintiff elects to anticipate the defendant's case at the opening, and to rebut it in advance, he must introduce all his evidence on that head then, and cannot put in part of it and offer the rest in rebuttal. *Casey v. Leroy*, 38 Cal. 699; *York v. Pease*, 2 Gray, 282; *Holbrook v. McBride*, 4 Id. 218; *Williams v. Jewett*, 12 Ind. 311. Here the plaintiffs attempted to prove title in themselves prior to their patent. The Baker conveyance was introduced for that purpose. But aside from that conveyance, the evidences of possession anterior to the patents, if they were of any value, was valuable only as evidence of title. That possession, if proved, would be *prima facie* evidence of title against a mere wrong-doer, is too well settled to require the citation of authorities. Since then, the plaintiffs, in their opening, introduced some evidence of title before the defendants' appropriation, it would be contrary to all the cases in this Court, and elsewhere, to allow them in rebuttal to produce further evidence upon that point — evidence merely cumulative of that already submitted by them. The possession alone, if sufficiently proved, was *prima*

facie evidence of title; and as was said by Lord Denman, in *Jacobs v. Tarleton*, 11 Q. B. 419, a plaintiff cannot be allowed "to rely, in the first instance, upon a *prima facie* case," and afterwards, when that *prima facie* case is, "called in question by the defendant, to call other evidence to confirm his *prima facie* case."

Aside from the fact that the certificates were in reality part of the plaintiffs' original case, the burden of proving which not only rested upon them by right, but was also assumed by them, we insist that the evidence did not rebut, or tend to rebut, any "affirmative fact" attempted to be proved by the defendants. And this is unquestionably essential to make it admissible as rebutting evidence. *Silverman v. Foreman*, 3 E. D. Smith, 322; *Marshall v. Davies*, 78 N. Y. 419, 420; *Briggs v. Humphrey*, 5 Allen, 316. The evidence, to be rebutting, should be "direct reply to that produced on the other side." *People v. Page*, 1 Idaho, 195. If it "mainly supports the case stated in the complaint, and only incidentally goes to explain or repel the evidence in behalf of the defense," it is not rebutting evidence. *Smith v. Richardson*, 2 Utah, 424. Now, what was the affirmative fact "proved or attempted to be proved by the defendants, which this evidence was intended to rebut? It was simply the fact that the defendants and their grantors had, by proceedings instituted in 1875, appropriated the waters of a stream on other lands than those claimed by the plaintiffs. Do these certificates rebut, or tend to rebut, that fact? Do they prove, or tend to prove, that no such appropriation was in fact made? Clearly, not. The defendants did not attempt to prove that the plaintiffs had no title to their lands. On the contrary, they accepted

the case made by the plaintiffs on that point, and admitting it to be true, introduced evidence to show that, before the title alleged and proved by the plaintiffs accrued, they, the defendants, had made an appropriation of the water referred to, as stated in their answer. Indeed, if they had offered evidence to show that the plaintiffs had no title at the time of that appropriation, it would have been immaterial and irrelevant, because the plaintiffs not only had not alleged that they had any title at that time, but on the contrary, had averred that the lands belonged to another. But of this allegation we shall have more to say hereafter. Even if it be conceded, however, that there was, under the pleadings, any issue as to the plaintiffs' title before patent, it was an issue of which the plaintiffs had the affirmative; and no evidence offered in support of that issue could by any possibility be anything else than original, and not rebutting evidence. If the defendants had alleged that the plaintiffs had no title before patent, as they offered no evidence to show it, there was nothing on the question of title to be rebutted.

2. *No abuse of discretion in rejecting the certificates is shown or attempted to be shown by the plaintiffs, nor was any ground laid at the trial upon which an abuse of discretion can be predicated.*

It will be noticed that throughout the argument of the plaintiffs in their brief on this point, they insist upon the admissibility of these certificates as matter of right, and not as matter of discretion. They do not claim that they made any application to the discretion of the Court for the introduction of this evidence, nor did they in fact make any such application. And if they had made any

application of that sort, they would have been required under the rule laid down in the Code to show some "good reason" for not introducing the evidence in its proper order in proof of their original case. The discretion confided to the Court is not an unlimited discretion, depending upon the mere whim or caprice of the Judge. He is authorized to admit, in reply, evidence which constitutes part of the original case of the party introducing it, only "for good reason and in furtherance of justice." He cannot admit it as mere matter of favor to the party. If he should do so, it would, as we conceive, be error. The plain intent of the Code is that good cause shall be shown by the party applying for the admission of the evidence. Here, as already stated, there was no pretense of an attempt to show cause. Even if such an attempt had been made, there would have been no abuse of discretion in rejecting the evidence, unless the cause shown was clearly and unmistakably a good cause. Indeed, as has been ruled over and over in numberless cases, a discretionary ruling will never be adopted as ground for the reversal of a judgment, unless the abuse of discretion is manifest. Under a statutory provision precisely like ours, in *Boals v Shields*, 35 Iowa, 233, in affirming a judgment sought to be reversed on the ground of the rejection of certain evidence offered in rebuttal, which, though material, was not proper rebutting evidence, the Court say: "While the Court may, in its discretion, for good reason, in furtherance of justice, permit a party to give evidence in his original case after he has closed, yet the order of the production of evidence to the Court or jury rests to such a degree in the discretion of the Judge trying the cause, that we would not be justified in interfering with the

exercise of this discretion unless in a clear case of its abuse."

The only semblance of a reason for not producing these certificates in the opening of the case is the statement made in the plaintiffs' brief, that the copies of the certificates were obtained and dated after the commencement of the trial. This is simply no reason at all. There was nothing to prevent the plaintiffs from procuring these copies before the trial. The plaintiffs show, indeed, by their own brief that they did not apply for the copies until after they had rested their case in chief. But if the plaintiffs' own laches was a good reason for not introducing this evidence at the proper time, the record shows that even that reason was not brought to the attention of the Court below.

3. *The cases cited by the plaintiffs as to the admissibility of evidence in rebuttal are none of them in conflict with the positions which we have taken on this point.*

These cases are reviewed in the respondents' brief, p. 15 *et. seq.*, where it is shown that "they are cases where the ruling was made at *nisi prius*, and the ruling never assigned as error; or, if so assigned and passed upon, affirmed as matter of discretion, because the testimony was *admitted* and *not rejected*; or, where the ruling was by consent, or not excepted to at all; or, where the evidence rejected was on a point for the first time brought out by the other party, after the party offering it had rested, and consequently the appellate Court could and did say that it was offered at the very first opportunity, and to rebut a new point, the making of which could not

have been anticipated." The majority of them were cases in which the evidence was *admitted*, and the ruling affirmed. Of course, such cases are not authority against our position here, because the Court below has a discretion to admit in rebuttal evidence which is not strictly rebutting in character. In the absence of any statute on the subject, this discretion is, no doubt, practically unlimited, and even under our Code, as we have seen, there is a limited discretion to admit such evidence. No case is in point here, for the appellants, which does not go to the length of showing that it would be error to reject evidence offered in rebuttal, which was not, under the rules laid down in the decisions heretofore cited, strictly rebutting in character; and even such a case would not be an authority against us under our Code, unless it should appear not only that the evidence was rejected, but that no "good reason" was shown to the Court below for its admission as matter of discretion. Only such a case would serve the plaintiffs' purpose here. Of course, where the evidence offered is not part of the original case of the party offering it, but is a direct reply to some new affirmative matter brought out by the other side, and could not from the very nature of it have been offered sooner, it would be absurd to say that the rejection of it would not be error. Such a case was *Hayward v. Draper*, 3 Allen, 552, which is one of the very few cited by the plaintiffs in which the rejection of evidence offered in rebuttal was adjudged error. That was an action for a deceit practiced upon the plaintiff in selling him an interest in a patented machine alleged to be worthless. The plaintiff proved the worthlessness of the machine and rested. The defendants then introduced an alleged model of the machine to

show its operation. The plaintiff denied the correctness of the model, and further offered evidence to show that a machine made according to the model could not be operated successfully. This evidence was rejected as not competent in rebuttal, and the ruling was held to be erroneous. The case was put distinctly on the ground that the model was brought into the case by the defendants, and that "the plaintiff had no opportunity to meet this particular piece of evidence until the defendants produced it." Obviously, also, he could not anticipate its production; and even if he had actually known that it would be introduced, he could not in his original case have offered any evidence as to its working, because such evidence would at that stage of the cause have been clearly immaterial and irrelevant. It requires a very lively fancy even to imagine the faintest similarity between that case and the case at bar.

Another case relied on by the plaintiffs, which perhaps calls for particular notice, is *Abbey Homestead Ass. v. Willard*, 48 Cal., 615, inasmuch as it is the only case on this point which is cited in the leading opinion. That was an action of ejectment. The plaintiff introduced a lease executed by it to the defendant, and rested. The defendant then proved that he was already in possession at the date of the lease, and gave evidence of an adverse possession for more than fifteen years. In rebuttal, the plaintiff was allowed, against the defendant's objection, to prove title under a Mexican grant, which had not been issued long enough before the acceptance of the lease to allow for the maturity of a title under the statute of limitations. This ruling was affirmed on appeal. That case is wholly unlike the one at bar in every vital particular. 1.

The evidence was admitted there, and the ruling could well stand as an exercise of discretion. 2. The evidence was directly and obviously in rebuttal of affirmative proof of title introduced by the defendant. 3. There is nothing in the case to indicate that the plaintiff had any ground to anticipate the proof offered by the defendant. 4. The plaintiff did not, in fact, attempt in his opening to go into proof of any title whatever anterior to the lease. 5. The case was expressly put on the ground that after the introduction of the lease the burden of proof as to title was on the defendant.

It is further to be observed, that the doctrines laid down in some of the cases cited by the plaintiffs on this point are clearly inadmissible here, because they are in direct contravention of our statute. Thus, in *Kent v. Lincoln*, 32 Vt. 598, it is said: "The plaintiff is entitled to rest, upon making a *prima facie* case. The defendant is then to introduce all his evidence in answer to the plaintiff's claim. The plaintiff is then allowed to introduce testimony to rebut the evidence given by the defendant, *and also additional evidence in support of his case as made in the opening*, and ordinarily this closes the evidence." That is to say, the plaintiff may offer part of his original case in rebuttal; but this is precisely what our Code says he shall not do, except by permission of the Court, "for good reason, in furtherance of justice."

4. *The certificates were also incompetent evidence at any stage of the cause, because they were offered to prove a title which was not only not alleged, but directly negatived by the complaint.*

The complaint alleges, in the first instance, in general terms, that at the commencement of the action they were the owners of the land described, and that they and their grantors had been for more than a year theretofore such owners.

But in a subsequent paragraph it is alleged "that the lands are swamp and overflowed lands, and as such *belonged* to the State of California, until the year 1876, and later, in which year and at various times afterwards, and before the commencement of this action, they were granted by the State to the plaintiffs or their grantors." This is entirely consistent with the previous general allegation of title; but if it were not so it would cut down the general allegation and limit it to the specific title alleged. It is a well-known rule that where a pleader alleges a title or other matter in general terms and afterwards alleges the title or other matter to have arisen in a particular way, the latter allegation must prevail and control the proofs. The specific allegation here is that until 1876 and afterwards these lands "*belonged to the State*" and were thereafter granted to the plaintiffs or their grantors. This allegation must be taken most strongly against the pleader, and must, therefore, be construed to aver that the absolute title, and not merely the dry legal title, was in the State until the year named when it was granted to the plaintiffs, etc., and the proof of title must necessarily be confined to those limits. The

plaintiffs could not even in their opening case have introduced against the objection of the defendants any evidence that the lands belonged to them or any one else, other than the State, prior to 1876. To allow a party to prove a different title from that specifically alleged would be contrary to the plainest principles. The adverse party would come into Court prepared to meet the title alleged, and would then be called upon to meet an entirely different title. Here the plaintiffs not only allege a particular title and negative any other, but they introduce in their opening, proofs corresponding to that allegation, and then after the defendants have put in their case, claim the right to offer in rebuttal an entirely different and older title which the defendants could not be expected to anticipate. The plaintiffs have expressly alleged that the lands belonged to the State prior to and until 1876. The defendants relying upon that have alleged and proved an appropriation of the water of the stream in controversy under and by virtue of the laws of the State during the time of such ownership. And now the plaintiffs claim, not merely the privilege, but the right, to show that the allegation in their complaint was false, and that the title was not in the State when this water-right was acquired under its laws, but was in the plaintiffs themselves! If this does not present a case of estoppel by pleading it would be difficult to find one. If our rules of pleading permitted a replication it is clear that the plaintiffs could not have been permitted to reply a title directly contrary to the allegations of their complaint. On what ground, then, can they be admitted to prove such a title? They say that this is proper rebutting evidence, but if it rebuts

anything it rebuts their own complaint, and we have yet to learn that the doctrine of rebuttal goes to *that* extent.

The plaintiffs claim, however, that we cannot rely upon this objection because we did not expressly state, in making the objection, that the evidence was inadmissible under the pleadings. The objection was that the evidence was irrelevant, immaterial, incompetent and not proper rebutting evidence. If this objection is not broad enough and specific enough to cover this point it would tax the ingenuity of counsel to suggest one that would do so. The first ground of objection is that the evidence was irrelevant. Now, what is meant by "irrelevant evidence?" It is evidence "which does not support the issue." Bouvier Law Dict. tit. "Irrelevant Evidence." The only issue which this evidence could possibly support would be an issue as to the title to these lands prior to 1876. But there is no such issue in this case. The complaint expressly alleges that these lands belonged to the State until 1876 and later. The answer says: "Defendant admits and on its information and belief alleges that the lands in said complaint described are swamp and overflowed lands, and as such belonged to the State of California until the year 1876 and later." It is certainly novel doctrine, to put it mildly, that an allegation on one side which is expressly admitted on the other raises an issue between the parties. Then, as there is clearly no issue on this point the evidence offered thereon is unquestionably irrelevant. And even if there were an issue the evidence would not support it. It would overthrow it. The issue could arise only upon our denial of their allegation and, the

evidence negatives the allegation. In like manner it may be shown that the evidence is immaterial. It cannot be material when it does not relate to any issue in the case. It is no more material than evidence of title to lands in Patagonia would be. So, and for similar reasons, the evidence was clearly incompetent. Thus it is seen that this evidence is obnoxious to every point stated in our objection.

5. *If for any of the reasons we have mentioned these certificates were inadmissible, and if, therefore, the ruling rejecting them was right, the judgment must be affirmed, whatever view the Court may take of the other questions involved.*

These certificates are indispensable to the plaintiffs' case. Without them the appeal must inevitably fail, whether the doctrine of riparian rights or that of prior appropriation is adopted as the law of this case, and whether the plaintiffs are riparian owners or not. If the plaintiffs were not the owners of these lands at the date of the defendants' appropriation, but if they belonged to the State, as alleged in the complaint and admitted in the answer, it is conceded on all hands that by the appropriation of the water in question the defendants acquired a paramount right thereto which cannot be divested or impaired by any subsequent grant of any of these lands. The appropriation being made in strict compliance with the laws of the State is good against the State and all its subsequent grantees. As justly and concisely stated by the learned Judge who delivered the leading opinion for reversal, "If the appropriation was made while the State was the owner

of said lands, the defendants' rights as to the water appropriated, according to the provisions of the Civil Code, would be superior to those of subsequent purchasers of said lands." The only evidence of title in the plaintiffs at the date of the appropriation which could by any possibility be available against the appropriation is contained in these certificates. There was, it is true, evidence of a certain prior conveyance from one Baker and others and also some attempted proof of possession under that conveyance; but this attempted proof of possession failed and the Court found against it. A sufficient possession would be evidence of title as against a mere intruder on the lands if proved. But as against an appropriator of the water of a stream a title to land through which the stream runs resting upon mere possession, however long continued, is not sufficient to confer riparian rights. *Covington v. Becker*, 5 Nev. 281; *Lake v. Tolles*, 8 Id. 285; *Osgood v. Eldorado Co.*, 56 Cal. 574. And as to the Baker deed, it was clearly worthless except as defining the extent of the plaintiffs' pretended possession, because there is no semblance of evidence that the grantors in that deed had any title. And even if there were any evidence of title in the grantors it would be nugatory, because it would be in direct conflict with the allegation in the complaint that the title was then in the State.

6. *The alleged rebutting evidence as to the existence of a watercourse through the plaintiffs' lands at certain points, where we undertook to show that there was no watercourse, was clearly improper in rebuttal, and its rejection was not error.*

This point is one second in importance only to that of the admissibility of the certificates, laying out of view for the present the great predominating question in the case as to the applicability of the California doctrine of prior appropriation on the one hand, or the common law doctrine of riparian rights on the other. If without this evidence no watercourse is shown to exist on the plaintiffs' lands, and if the evidence was rightly rejected, the plaintiffs are not riparian owners, and have no cause of complaint, whatever may be their title to their lands, and whatever may be the law of California on the subject of property in the water of a stream running through lands acquired from the State or from the United States.

Under the rule of our statute and of the authorities heretofore cited, it is manifest that the evidence sought to be introduced in rebuttal as to the existence of the alleged watercourse at the points where we attacked it was really part of the plaintiffs original case, and not competent in rebuttal except in the discretion of the Court for good reason. The burden of proving that there was a watercourse, that it was the continuation of Kern River, and that the plaintiffs were riparian owners upon that water-course, was upon the plaintiffs at the outset and throughout the case. They were bound by their allegations, and by the imperative necessities of their case, to show a continuous water-

course from Kern River through their lands. It was not sufficient to show that there were occasional unconnected depressions in their lands, in which water sometimes or generally stood. They were compelled to show a connected stream, and that it was part of Kern River. Failing in this, they could not complain of any diversion of the waters of Kern. Not only were they required to show this by a preponderance of evidence, as the leading opinion in this case declares, but they actually undertook to show it, and claimed that they had shown it before we put in our evidence. They went into the most particular proof of every part of it, by a great number of witnesses testifying not only as to the whole stream, but, *ex industria*, meandered every part of it. (See the references to the evidence and to the claims of counsel on this point in respondent's brief, pp. 187, *et seq.*) Clearly, then, upon recognized legal principles, and in accordance with the plaintiffs' own conduct of their cause, the proofs on this point, the whole of them, were part of their original case, and they were bound to introduce the whole of it in chief. They could not put in just enough evidence to raise a probability of such a continuous water-course, and then, after we had broken up that water-course at various points, introduce other cumulative evidence in rebuttal to patch it up again. If they could do that, they could throw the burden of proof upon us, and reserve the bulk of their evidence for rebuttal. Upon this view of the law of rebuttal also a party may in any conceivable case save part of the evidence upon any issue, the affirmative of which is upon him, and insist upon introducing it in rebuttal, and the distinction between original and re-

butting evidence fades to a mere shadow, a legal myth to delude the unwary.

It is plain that evidence cannot be rebutting which is merely a reply to evidence which is itself simply rebutting. If it were, the doctrine of rebuttal would open up boundless possibilities for the prolongation of trials by shrewd practitioners. Rebuttal might be heaped upon rebuttal, "like Pelion on Ossa piled," until the case grew into a mountain of quibble and wrangle, capped with a bill of costs. In the very nature of the case there can be no rebuttal except where the evidence to be rebutted is itself original evidence, offered to sustain some affirmative issue. In the present case, our evidence respecting this stream was not offered to support any issue tendered by us. It was simply rebuttal of the case made by the plaintiffs. While it is true that we rebutted by attacking the alleged water-course at particular points, we did so because we could not do otherwise. We could not possibly show, and we were not required to show, that there was no trace of a channel anywhere along the alleged course of this stream. We were called upon simply to repel the plaintiffs' evidence that there was a connected water-course constituting the continuation of Kern River. This we did, and did successfully, in the only way open to us; but our evidence was in purpose and character wholly rebuttal, and, therefore, could not itself be rebutted without violating one of the most fundamental and wholesome rules of common law and statutory procedure. We deem it unnecessary, however, to discuss the point further. Much of what we have said in discussing the admissibility of the certificates is equally applicable to this branch of

the case. It will be observed also that if we are correct in our claim, that the Court below did not err in ruling out the certificates, then it necessarily follows that this testimony was immaterial and its rejection no error, because if the plaintiffs had no right prior to our appropriation, the question of water-course cuts no figure.

7. *None of the points above discussed as to the competency of the alleged rebutting evidence seem to have been fully present to the minds of the members of the Court at the former hearing and this alone would justify the Court in directing a re-argument.*

We have carefully read both the opinions heretofore delivered in favor of a reversal, and, as already stated, although the *only* grounds of reversal were the alleged errors in rejecting the rebutting evidence, neither of the opinions discusses the question of rebuttal at all. There is no allusion to any of the numerous cases cited by us on that point. Only one case is referred to which bears at all upon the question of rebutting evidence. That is the case of *Abbey Homestead Ass. v. Willard*, 48 Cal., 614. And the citation of that case is made so briefly and casually that a reader of the opinion, not familiar with the case, would probably not discover that it was an authority upon the question of rebutting evidence. Besides, the case cited is itself very meager and unsatisfactory on this point. It makes no allusion to the provision of our Code on that subject, and does not discuss the question. It simply decides that the evidence "was properly admitted in rebuttal." That ruling is entirely consistent with the view that the admission of the evidence was merely a

proper exercise of the discretion confided to the trial Court by the express language of the statute. The case is no authority whatever for the doctrine that if a Court should, in the exercise of the same discretion, *reject* evidence offered in rebuttal which was not proper rebutting evidence, it would be good ground of reversal. Indeed the appellate Court was not called upon to decide as to its competency as strict rebutting evidence, for whether it was or not, the Court below could, in its discretion, admit it anyhow, and did in fact admit it. As no abuse of discretion was shown or alleged the ruling was clearly not error affording ground for reversal, and the affirmance was right. But the case does not militate against our position here. On the contrary, it rather supports our position, showing as it does the indisposition of this Court to interfere with the ruling of a trial Court upon mere matters of discretion.

It will be noticed also in reading the opinions heretofore delivered in the case at bar, that the attention of the learned judges seems not to have been called to the fact upon which we confidently rely, that the certificates were not competent evidence either in rebuttal or in chief, because they bore upon no issue between the parties, but were in conflict with a direct and positive allegation in the complaint which was expressly admitted and re-affirmed in the answer. The whole tenor of the opinions, so far as they relate to the admissibility of the rejected evidence, goes to show that the learned judges had principally in view its materiality as evidence of the plaintiffs' title as riparian owners at the date of the appropriation. Indeed Mr. Justice McKee seems from his opinion to have based

his judgment upon the competency of the evidence solely upon its materiality as to the title. He does not allude to its competency as rebutting evidence in the remotest way. Now if we were to admit that the evidence was not only material but vitally necessary to the establishment of plaintiffs' title as riparian owners at the date of the appropriation, we still have the right respectfully to insist, and do insist, that if the plaintiffs have by their complaint precluded themselves from introducing this evidence at all, or if they have failed to introduce it at the time when, under the Code, they must introduce it, and have neither made nor attempted any showing entitling them to its admission in rebuttal as matter of discretion, this Court cannot, and should not if it could, reverse the judgment on that ground.

In commenting thus freely upon the omissions in the opinions to pass fully upon the important questions involved in the rulings upon the admissibility of the rejected evidence, we would not be understood to complain of any lack of diligence, attention or discrimination on the part of any of the members of this Court. We are conscious that these vital points were to a great extent obscured by other great and overshadowing questions in the cause, and it is not strange that they failed to attract due attention. We have an abiding faith, however, that upon a re-argument we can show beyond question that the rulings on these points in the Court below were entirely correct.

II.

If the certificates and other rejected evidence had been admitted they would not have been sufficient to maintain the plaintiffs' case.

This point is considered at length in our brief, but we deem it proper upon this application to bring it again especially to the notice of the Court.

1. *The certificates are not sufficient to confer riparian rights under our law, certainly not, unless coupled with proof of full payment.*

These certificates are merely contracts to convey the land included therein, and do not, of themselves, at least before payment, under our law constitute a title which can be made available against an appropriation of the water of a stream running through the land. It is expressly adjudged under the Swamp Land act in Arkansas, that a certificate issued by the State authorities to an applicant for the purchase of swamp lands does not, before payment, confer any vested rights. *Brewer vs. Hall*, 36 Ark., 351. Such a certificate stands upon the same footing as any other executory contract by the owner in fee for the sale and conveyance of land. And in Nevada it has been recently held that a purchaser in possession under an unexecuted contract by a railroad company, owning the land in fee, for the sale of the same has no riparian rights, *Smith v. Logan*, 1 West Coast Rep., 391. And in *Osgood v. El Dorado Co.*, 56 Cal., 574, it was held even against a pre-emptioner who had resided for years upon the land, and had re-

ceived his certificate that his riparian rights, if any he had, as against an appropriation of water from a stream on the land, must date from his patent.

It is true that the certificates, in this case, are, under the code, *prima facie* evidence of title. But it is settled that a *prima facie* title is not sufficient under our law to confer riparian rights as against an appropriator of the water of a stream. Possession is *prima facie* evidence of title. And it has been adjudged in California that an actual possessor of public lands without title is to be deemed the owner as against a mere trespasser. *Page v. Fowler*, 37 Cal., 100. Yet it is conclusively settled that such a possession, however long continued, cannot avail to prevent an appropriation of water in a stream running through the land, *Covington v. Becker*, 5 Nev., 281; *Lake v. Tolles*, 8 Id., 285; *Osgood v. El Dorado Co.*, 56 Cal., 574. So in the case of a possessor under a contract of sale upon land owned by a railroad company. *Smith v. Logan*, 1 West Coast Rep., 391. These cases are sufficient to show that a mere *prima facie* title will not satisfy the exigencies of the plaintiff's case. In any view their certificates will not avail them without proof of full payment of the purchase money. There must be, as stated in our brief, nothing left to be done to complete the title but the mere ministerial duty of issuing the patents. Resp. Brief, p. 63. This is the ground upon which all the cases are put which are cited by the plaintiffs. Now, in this case, there was no pretense of evidence of payment of more than one-fifth of the purchase money, and the only evidence of that is the recital in the certificates. We maintain that such a recital is not even *prima facie* evidence of payment against a stranger to

the contract. The certificates are *prima facie* evidence of title, but a recital therein of the collateral fact of payment is not thereby made evidence against us. This is too well settled to admit of controversy, *Megerle v. Ash*, 33 Cal., 84; *Smith v. Athern*, 34 Id., 574; *Daniels v. Lansdale*, 43 Id., 41; *Lansdale v. Daniels*, 10 Otto, 118; *Osgood v. Water Co.*, 56 Cal., 518.

2. *The alleged rebutting evidence relating to the pretended water-course, would not, if admitted, make out with the other evidence, proof of any water course.*

The whole evidence in this case, if all admitted goes to show, as the Court found, that there is no water-course through the plaintiff's lands which will satisfy any of the approved definitions of that term. Indeed, the plaintiffs reject the definitions of "water-course" given by the standard text-writers on this subject.

Thus, the definition given by Angell, that a "water-course consists of bed, banks and water," is said by the plaintiffs to be too stringent; to constitute a water-course, they say in effect, a bed or channel is not absolutely necessary; banks are not an indispensable requisite, and even water is not always essential. The plain fact is, that their whole evidence on this point is devoted to the task of piecing out a water-course from a string of mud-holes in a swamp. Even if we were to concede that a swamp is a water-course, it would not meet the exigencies of their case, for then they are not riparian owners since they do not own the sides or banks of the swamp, but only its bed; and that does not confer riparian rights. Says the learned Lord Selborne in *Lyon v. Fishmongers Co.* 1 L. R. App. Cases

683: " With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word ' riparian ' is relative to the bank and not the bed of the stream. And the connection, when it exists, of property on the bank with property in the bed of the stream depends not upon nature but on grant or presumption of law. * * * The title to the soil constituting the bed of a river, does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may lawfully be so appropriated by every one having a right of access to it." The constituent element of a water-course, however, to which the plaintiffs take the most serious objection, is the requirement of banks. They want a stream unconfined, not pent up by any rigid banks or defined channel; and yet banks are the one thing upon which their rights depend. There must be a bank, and they must own land upon it, or they have no case here. There can be no *riparian* without a *ripa*.

The utter insufficiency of the evidence to establish any actual water-course through these lands is tacitly confessed by the plaintiffs in that part of their argument which attempts to show by *a priori* reasoning, that there must be a water-course there because there is no other outlet for the waters of Kern and Buena Vista lakes. Surely, if there is any water-course there, it must be visible, and its existence must be susceptible of positive proof, and it is wholly unnecessary to try to prove that there is a water-course because there ought to be one. The argument is this: Every lake must have an outlet, and that outlet must be a water-

course. This lake has no outlet except through these lands; therefore there is an outlet there and hence a water-course. This singular line of argument by the plaintiffs furnishes the strongest possible admission, because it is an admission unwillingly made, that as a matter of fact there is no water-course on these lands which can be found or traced.

The truth of the matter is, as the Court finds, that Kern River terminates in Buena Vista and Kern Lakes, where its current ceases and its waters are at rest, mingling with the rainfall and the occasional drainage of the watershed of the shores of those lakes. Conceding, for the sake of the argument, that there is any water-course below the lakes, it is at most merely the overflow of the water of those lakes, and is no more a part of Kern River, as the opinion of the Court below abundantly shows (8. P. C. L. J., p. 477), than the outlet or overflow of any other lake is a part, a continuation, of the river or rivers flowing into it. The fact that Kern River is the only river flowing into the lakes does not affect the case. The essential nature of a lake is not changed nor is the distinction between it and a water-course abrogated by the fact that it has only one tributary instead of a dozen. A real lake, which is not merely the expansion of a water-course, a lake whose waters have no definite flow in any direction, but are stationary, is the end of all streams entering into it, and is the original source of all streams emptying out of it. The lake is not the continuation of the streams which supply it, but a distinct body of water. Nor does it furnish the connecting link between those streams and the streams which originate from it, so as to make them one. It is simply absurd

to say that Kern River, Kern and Buena Vista Lakes, and the plaintiffs' swamp, are all one stream. They have nothing in common except that they are all wet. We are called upon to believe that this river expands into a sheet of water twenty miles long and five or six miles broad, and then shrivels into an alleged water-course so small and obscure that it takes a syllogism to find it, and yet that it is, all the time, the same river. Could the force of absurdity further go? We venture to say that there is not a settler in all that region, outside of those who have been educated into a different belief for the purposes of this litigation, who, if told, while floundering through Buena Vista Swamp, that he was crossing Kern River, would not stop swearing to laugh in the face of his informant!

If then this mythical water-course is not a part or continuation of Kern river, the diversion of the waters of that river even though the plaintiffs' lands are actually damaged thereby, affords them no grounds of action. It is *damnum absque injuria*. The consequence is too remote from the pretended cause to give a right to legal relief. The defendants have a perfect right as against the plaintiffs to divert as much water as they please, either from Kern river, or from Kern or Buena Vista Lake, before it reaches the head or outlet of the alleged water course upon which the plaintiffs' lands are: *Cummings v. Barrett*, 10 Cush., 187; *Broadrent v. Ramsbotham*, 11 Ex., 615; *Ravstrom v. Taylor*, Id., 602. If on the other hand, as we contend, there is no legal water-course at all through the plaintiffs' lands, and those lands are a mere swamp kept wet by percolation and seepage from the adjacent lakes, there is no question of riparian rights involved, and the plaintiffs

have no cause of complaint against the defendants for anything they may do for their own benefit on their own land or on government land upon which they have license to go, which occasions a diminution of moisture in that swamp. Much less can they complain where, as here, they hold under a contract with the State which binds them to drain the land, if we have partially drained it for them.

III.

The rule that the prior appropriator has the better right to the waters in all non-navigable water-courses, and not the modern English doctrine of riparian rights, is and has been the law of this State as to all lands granted, or still owned by the State or Federal government, and therefore the plaintiffs must fail in this case whether they are riparian owners or not, and whatever may be the date of their title.

This, so far as the public interests are concerned, is the overshadowing question in this case, and it is one which undoubtedly demands grave and even anxious consideration before a determination is reached, if it should be deemed necessary to determine it at all, in its full extent, in order to decide the case. While we confidently maintain, on the grounds already stated, that the plaintiffs are not now, and cannot be placed, in a position to contest this point with us in this suit, we yet respectfully urge upon the Court that if this is to be the decisive question in the case, counsel ought to be allowed to be heard further upon it, not only for the protection of their immediate clients but also in the interest of the public. Before

concluding this application we purpose to submit some general considerations which, it seems to us, ought to have weight in influencing the Court to direct a re-argument of this question; but we desire first to present some of the positions involved therein which we feel assured that we can maintain upon another hearing. These are certain points relating to this matter which we understand to be conceded and which it will therefore be unnecessary to discuss. They are:

1. That upon streams wholly upon public lands, State or Federal, as between persons claiming a right to the water by mere appropriation, the prior appropriator has a vested interest to the extent of his beneficial use, which cannot be disturbed, and that this interest is recognized and protected by both State and Federal adjudications and legislation.

2. That one who has made a valid prior appropriation of the water in a stream on public lands has a property therein paramount to any subsequent grant of any land upon that stream by the State or general government.

3. That this doctrine of prior appropriation has no application to streams on lands held by Mexican grants ante-dating the government title, and that an appropriation of water in such streams, to be valid against those deriving title under those grants, must be sanctioned by express contract or must have been continued for such a length of time as to vest an indefeasible right under the statute of limitation.

There are certain other points which we understand also to be conclusively settled, but which we have already discussed in this petition and which, therefore,

do not seem to us to require further argument. These points are:

1. That a mere occupant of public lands without title, however long continued his possession, and although he is a *bona fide* settler intending to apply for and purchase the lands, has no riparian rights which can avail against one who, during such occupancy, makes a prior appropriation to beneficial use of the water of a stream running through the land. *Osgood v. El Dorado Co.*, 56 Cal. 574; *Covington v. Becker*, 5 Nev. 281; *Lake v. Tolles*, 8 Id. 285.

2. That a purchaser of such lands from the State or Federal government, who has received his certificate, but has not entirely paid for the land, and otherwise performed the contract on his part, so as to vest a complete equitable estate in him entitling him to a patent upon mere application therefor, has no riparian rights which can avail him against an appropriation of the unappropriated water of a stream running through the land; and so of a purchaser in possession under any other executory contract of purchase. See the cases referred to elsewhere in this petition.

The points thus conceded or established are sufficient of themselves to defeat the plaintiffs' claim. But we do not rest the case here. We insist that the doctrine of acquisition of water-rights by prior appropriation has a still wider application, and extends also to cases where, before the appropriation, the title to the land, through which the stream runs, has passed by patent from the State or Federal government to its grantee. We proceed now to the successive steps in the argument by which we think this can be conclusively shown.

1. *This doctrine of title to water in a stream by priority of appropriation is a part of the common law of California antedating any statute upon the subject.*

This is settled by a long line of California and federal decisions, among which may be mentioned: *Irwin v. Phillips*, 5 Cal., 140; *Tartar v. Spring Creek, Etc., Co.*, Id., 397; *Conger v. Weaver*, 6 Id., 555; *Hill v. King*, 8 Id., 338; *Butte v. Vaughn*, 11 Id., 153, *McDonald v. Bear River Co.*, 13 Id., 232; *Rupley v. Welch*, 23 Id., 455; *Achison v. Peterson*, 20 Wall., 507; *Basey v. Gallagher*, Id., 670; *Jennison v. Kirk*, 98 U. S., 458; *Broder v. Natoma, Etc., Co.*, 101 Id., 274. The doctrine had its origin among the miners of California's golden age, and was fashioned out of the rude but equitable customs of those hardy pioneers who, in the absence of other law, were a "law unto themselves." The mountain, the cañon and the wilderness were theirs. The government, the owner of all the land and streams over which they roved and in which they delved, was far away and tacitly acquiesced in their pitching their tents and striking their picks where they chose. The land was valuable in their eyes only for the gold it contained, but water was a prime necessity. The only equitable mode of acquiring property in either, as among themselves, was by priority of occupation. But the common law doctrine that the water was a mere incident and appurtenance of the land and incapable of separate ownership if recognized as a part of that law of title by prior occupation would enable the first comer to seize upon some spot at the foot of a gulch or ravine in which ran a mountain stream, and practically control all the mining ground above and

around him, because the mines could not be worked without interfering with his "riparian rights." Obviously, then, this doctrine of "riparian rights," if they had ever heard of it, was wholly inapplicable to their situation, and their only resource was to recognize a separate property in the waters of all streams, and to permit each in turn to appropriate what was necessary for the working of his claim and to transport it by flumes and ditches from its natural bed to the place where he wished to use it.

But though the doctrine of title by priority of appropriation originated in the mines, it originated there because the necessity was first felt there and the obvious equity of it, coupled with its extending necessity in a growing State where the streams were few and far between, soon led to its general adoption as applied to irrigation, milling and other beneficial uses for which water was essential. That the doctrine was thus extended so as to cover other valuable uses of water besides mining operations is clearly shown by the authorities. *Butte v. Vaughn*, 11 Cal. 153, *Ortman v. Dixon*, 13 Id. 38; *McDonald v. Bear River Co.*, Id. 292; *Rupley v. Welch*, 23 Id. 455. In fact the doctrine, under the fostering care of judicial and legislative recognition and approval, soon grew into a complete system of water-right law, and has ever since been a part of what may be termed the common law of California. Originating as it did in necessity, it was coeval with the necessity and antedated the organization of the State.

2. *This doctrine is wholly at variance with the present English common law doctrine of riparian rights.*

This is obvious from a bare statement of the two doctrines. The common law doctrine is that a natural stream is an appurtenance of the land over which it runs, a part of the riparian owner's estate, and incapable of separate ownership. The California doctrine is that the water in such a stream is a thing apart from the land, an independent subject of property right, that property in it can be acquired only by appropriation to some beneficial use, and that, when so appropriated, it belongs to the appropriator to the extent of the appropriation, and no further, whether he is the owner of the land over which it runs or not. The strict common law doctrine is that the water in such a stream must be permitted to run as it has been accustomed to run through the lands of the successive proprietors of its banks, and that even a riparian owner cannot permanently divert from its natural bed, but that whatever use he may make of it on his own land, he must return it to the stream before it leaves his land, without substantial diminution or deterioration. The California doctrine requires the diversion of the stream, or some active interference with its flow in its natural channel, otherwise there is no appropriation. The authorities, if authorities are needed on so plain a proposition, are clear to the point that there is a substantial and vital difference between the two doctrines, and that it was because of this very difference, and because the common law doctrine was felt to be inapplicable to our situation that the California doctrine was adopted. *Rupley v. Welch*, 23 Cal., 455; *N. C. &*

S. C. Co., v. *Kidd*, 37 Id., 314; *Achison* v. *Peterson*, 20 Wall., 307; *Jennison* v. *Kirk*, 98 U. S., 458. So in Colorado where the same doctrine has been adopted. *Coffin* v. *Left Hand Ditch Co.*, 11 Pac. L. J., 419. There are no doubt numerous *dicta* in the early California cases tending to show that the judges had some vague notion that the doctrine was somehow sustainable on common law principles. If the common law doctrine which they had in mind was that which was supposed to prevail before Lord Denman's famous judgment in *Mason* v. *Hill*, they were no doubt correct in that opinion in the main. It is not to be wondered at however, that judges trained in the common law school with the inveterate prejudices in favor of old ways, which such a training naturally begets, should, in dealing with a new and strange doctrine fresh from the mining camps of California, greet it with the jargon of Westminster Hall, and seek to clothe its sturdy proportions in what they regarded as staid and decent common law raiment, before adopting it into the family of their cherished legal principles dating from a time "whereof the memory of man runneth not to the contrary." But surely at this late day, we ought to be able to tell from the form, features speech and ways of this stalwart son of the Sierras, that he is no true scion of the ancient stock, and never got his learning from the Year-Books.

We venture to affirm that the adjudications of our Courts on this subject of water appropriation are utterly unsustainable upon any construction of the common law doctrine of riparian rights. For example: by the common law, a peaceable occupant of land is *prima facie* the owner as against one who can show no better

title. As such owner the land is his, the grass is his, the water is his. His property rights, in short, are as ample as if he were the true owner, as against any mere intruder. He may defend an ejectment brought by a stranger to the title, and may maintain trespass against a wrong-doer. So it is in California as to a mere settler or occupant upon the public lands in every other respect except as to his rights in a water-course on the land. (*Page v. Fowler*, 37 Cal. 100) If his possession is disturbed by an intruder treading down his grass, he may have his action. And yet under the doctrine we are considering any stranger without shadow of title or possession may go upon adjoining public land and divert from him the waters of a stream which he has not himself appropriated to beneficial use and he is without remedy. Upon what possible view of the common law rule of riparian rights can this be done? The license of the government is no explanation of this anomaly. The occupant of the land is himself a licensee. He may be a settler intending to purchase the government title. If the stream is appurtenant to the land, a necessary incident of the title to it, he as the appropriator of the land is a prior appropriator of the stream. The only ground upon which he can be divested of his rights to the stream by a stranger is that the stream is not part of the land, not appurtenant to it, but is an independent subject of property right. That is the California doctrine, as we maintain, but it is not common law doctrine. The difference is still more apparent where one occupies State land and another afterwards goes upon an adjoining tract of government land and diverts the water-course or *vice versa*.

It is claimed, however, that because the State at the organization of its government, adopted the common law of England without limitation as to time, it must be understood to have intended to adopt the common law as it was at the date of the act; that this included the stringent riparian rights doctrine of *Mason vs. Hill*; that this doctrine was therefore adopted in its full extent, and that whether adapted to the condition, situation and necessities of the State or not, that doctrine cannot be modified or departed from except by statutory authority. This is claiming more for the common law than is accorded to it in the country where it originated. The common law is not regarded in the home of its birth as a rigid, inflexible system which cannot be changed except by statute, however ill-adapted to the wants of the English people. It is undergoing constant though very gradual modification there. That fact is conspicuously shown by the earnestness with which counsel insist that the common law which we have adopted, is the common law as it was in 1850, and not as it was in 1776. If it is such a rigid unchangeable thing as is claimed, and is always the same, what difference can it make which date is chosen? The fact is, that the common law has grown to its present stature through many a century, and that it is still growing as the people who fashioned it are growing. It could never be intended that California, a young and vigorous commonwealth should adopt it in its entirety without regard to its adaptation to her wants, and keep it forever so unless changed by the dangerous tinkering of average California Legislatures. It was adopted as a growing system. Its useless parts were pared away by successive adjudications. It was

modified in its harsher features, and was in fact, made to fit the State.

This very doctrine of riparian rights was one of the excrescences which was first lopped off, and another doctrine better suited to our wants was adopted in its stead. The adjudications already cited show that on that very ground of non-adaptation to our necessities the common law rule was rejected in favor of the California doctrine of title by appropriation as soon as the system was imported. We are not now asking any modification. We are asking simply that the Court should adhere to the California doctrine already adopted by a long line of adjudications, and to carry it out to its legitimate consequences. Surely a doctrine so equitable that in less than a quarter of a century it has made its way into the Supreme Court of the United States, and into the halls of Congress, and has become a prominent and permanent feature of our national land system, ought not now to be abandoned in favor of the rigid rule which it displaced, in the land of its birth, and in the very Court in which its ablest exponent, Mr. Justice Field, acquired his first fame as a Judge.

3. *This doctrine is not founded in mere license applying to public lands, but is permanent rule of property in California, impressed upon all the lands which constituted originally the public domain.*

The only consistent theory on which the adjudications upon this subject can be explained, is that, as to all lands belonging originally to the public domain in this State, property in land does not, as at common law, include property in unappropriated streams of water

running through it. The water is a separate species of property, dedicated to the use of those who may acquire title to it by priority of appropriation to beneficial uses. This was undoubtedly the view which the miners, who first put this doctrine in practice, took of it. It was that view in which the Federal Government first silently and afterwards expressly acquiesced, and which the State Courts and Legislature adopted. And it cannot be questioned that it was entirely competent for the owner of the public domain to adopt such a rule respecting it. The doctrine of a mere license will not, as we have already stated, explain the adjudications on this point. How could a mere tacit license before the statute of 1866, to one person, to go upon and occupy a tract of land including a natural stream, and to another to go afterwards upon an adjoining tract and divert that stream, fix the rights of the parties between themselves, so as to make the diversion lawful, when the stream was part of the land, and was therefore already appropriated by the occupancy? Suppose that in such a case the occupant of the land had sued for injury, could the defendant have relied upon the fact that the Government did not prevent his doing it as a defense, if the stream was really parcel of the land? If not, how could the Government have intervened in such a suit between private parties to protect the appropriation of the stream? A further evidence that the right to appropriate a stream as against a prior occupant of land upon which it ran, did not rest in mere license, but in the fact that it was regarded as established law that the stream was not part of the land, is found in the admitted fact that a subsequent patent issued to the occupant would not defeat

the appropriation of the stream. Yet, if the stream was part of the land, a conveyance of the land would, *ipso facto*, revoke the license to divert the stream. On the other hand, if the stream was not part of the land, a conveyance of the latter could not possibly revoke the license to appropriate the former.

It must be clear, therefore, that this doctrine is in reality a rule of property severing the stream from the land and subjecting each to a possible independent ownership. A patent for land, then, does not convey any right to the streams running through it any more than it conveys the government horses that may be grazing on it at the time. The streams do not pass by the patent, not upon the theory intimated by one of the opinions delivered in this case, that there is any implied reservation of the streams, but because the streams are no part of the thing conveyed. Hence the streams continue subject to appropriation as they were before. This is expressly adjudged to be so in Colorado independently of any statute in *Coffin v. Left Hand Ditch Co.*, 11 Pac. L. J. 419. The same principle applies to State lands, not only because they were originally part of the public domain, but also because the State has adopted and maintained, from the beginning, the same rule of property. We insist, therefore, that even if the plaintiffs had full title to their lands at the date of our appropriation and if they were in fact riparian lands, no title to the alleged water-course passed by the grant, and we had an undoubted right to appropriate its waters, if not already appropriated.

4. *The statutes of the Federal and State Legislatures on this point are merely in affirmance of the pre-existing law, prescribing some additional rules as to how the right to appropriate may be exercised.*

This is expressly adjudged to be so with respect to the federal statute in *Achison v. Peterson*, 20 Wall. 507 and *Broder v. Natoma Water Co.*, 101 U. S. 274. It is equally so as to our State statute. The provisions in our code on that subject are full and ample. They recognize and authorize the right to acquire water rights in all non-navigable streams by prior appropriation. The language could not, indeed, be made more sweeping. There is no hint anywhere that the rule was intended to apply only to streams wholly on public lands. There is, however, a proviso at the end of the statute that it shall not affect the rights of riparian proprietors. Obviously this refers only to riparian rights existing and vested at the date of the statute. Otherwise, it is repugnant to the body of the statute and therefore void. If the words are construed in their largest sense, there is not an inch of land in the whole State to which the statute could apply, because the State and Federal governments are themselves riparian proprietors on all streams included in their lands, and they, with the private land-owners, own all the lands in the State. Certainly it could not be intended to limit such a statute to streams which are wholly on public lands at the date of the appropriation, saving the rights not only of all existing riparian owners and those who should afterwards become such. We doubt whether there is now a stream of that character of any importance in the whole State.

5. *The doctrine that the right of appropriation, either under the common law of the State or under our statute, is limited to streams wholly on public lands at the time of the appropriation, conceding that there such streams of any value would lead to inextricable confusion.*

Under such a rule there would be no certainty as to what the law was on any stream at any time. Two streams within half a mile of each other might be governed by entirely different rules, one being subject to appropriation under the California doctrine, and the other subject to the law of riparian right. And the same stream might be changed from one rule to the other and then back again by the caprice of a single individual purchasing the smallest subdivision of land at the mouth of the stream and then surrendering it again. Valuable streams capable of irrigating large tracts might be shut within their banks and left useless by a single person purchasing an infinitesimal fraction of land upon them. This is well illustrated in the case at bar. If the plaintiffs' certificates are admitted they show, as the Court will see by looking at the plat parts colored red in respondent's brief, page 23, part II, that of all the land embraced in them there is but a small fraction of a single section (taking plaintiffs' claim to be true) that is riparian land. Here then are churlish owners of a little fragment of a swamp who undertake to dictate to the present and future owners of lands along and near the borders of Kern and Buena Vista lakes, and on or in the vicinity of the banks of Kern River to its source, that they shall never make use of the

waters of this stream to irrigate any land which is not strictly riparian. And this although the waters of the river are sufficient to irrigate thousands of acres of land without a cent's damage to their riparian fragment. We cannot believe that this Court, upon further consideration, will adopt a doctrine which will produce such results.

Again, the law as laid down in the leading opinion in this case, works another most extraordinary result on this very stream. The Federal Government owns the land on Kern river above the lakes and above the State swamp lands now claimed by plaintiffs. By the policy of the Federal government and by the decrees of its Courts the doctrines of riparian law have no application to Kern river on the lands above. By that policy and according to those decrees as the licensees of the government, the defendants had the right to appropriate and have appropriated water from Kern river to irrigate the government lands above. According to the decree of this Court the same rule which has always applied to the lands above, and still applies to them, also applied to the State lands below until plaintiffs obtained their certificates. Then, as to the lands below, i. e. the State lands, the rule immediately changed, and the doctrines of riparian law became applicable. So we have two rules of law existing at the same time on the same stream, one maintained by the Supreme Court of the United States and the other by the Supreme Court of this State, and entirely impossible of reconciliation with each other.

Will this Court, after full consideration, maintain that the purchaser of a few acres by plaintiff on Buena Vista Slough has changed the whole rule of law as to

water upon the government lands on Kern River, and as to them made the riparian rule applicable by mere force of that purchase, notwithstanding, for broad reasons, the Supreme Court of the United States has held them inapplicable.

The government alone is the riparian proprietor above, it owns in a solid body all the lands above on both sides of the stream within the water-shed. It has licensed the defendants to take out that water and use it for irrigation upon these government lands, it is true, away from the stream, but still on a part of the same general body of lands of which the government is the proprietor. This the Supreme Court of the United States has said, the licensees of the government may do because in the Pacific States and Territories the doctrines of the common law declaratory of the rights of riparian owners were found at an early day to be inapplicable.

This Court, we respectfully submit, says in effect that though we have followed the law as laid down by the Supreme Court of the United States, still that law is repealed by the issuance to the plaintiff of a certificate of purchase for 320 acres of land on Buena Vista Slough, and therefore we have acquired no rights by one appropriation, and all our expenditures must go for naught.

6. *The doctrine of title by appropriation is just and reasonable, and should, upon its merits, be maintained if possible, as the permanent policy of the State.*

This is conceded by all who have discussed this question. The reasonableness and manifest equity of the doctrine are the considerations which led the Fed-

eral government and all our adjacent States and Territories to borrow it from California, and to make it the rule in nearly all the far west. The rule, under the wholesome restrictions of our code, is, and must continue to be, if not impaired by your Honors' decision in this cause, of incalculable benefit to the State. In some sections of the State, owing to the scarcity of water, such a system as that for which we contend, and which has hitherto been supposed to be the law, is absolutely indispensable. There are thousands of acres of lands which a liberal and enlightened policy in this regard will bring into fruitful cultivation, but which must remain barren if the narrow rule of the English common law is to be now enforced. There can be no hope of help from legislation, because if the rights claimed by the plaintiffs for themselves and other riparian owners under state and national grants exist at all, they are vested rights, and legislation cannot now affect them. These might not be valid reasons for the adoption of the California doctrine, as we understand it, if it were now presented for the first time, after the State had been operating for years under the common law rule, but they are sound reasons for not reversing that doctrine, or so limiting it as to make it practically valueless, when there is no prior decision rendering such a course necessary. At all events, the considerations which we have thus presented, ought to be sufficient to warrant your Honor in granting another hearing. We venture to suggest also, if we may do so without offense, that a decision on questions so momentous—a decision which is likely to determine the policy of this State on this great subject for all time, ought not, if it can be avoided, to proceed from a divided Court. The

English reports are full of cases which have been heard over and over again because of differences of opinion among the Judges. Certainly, if any questions could merit the application of such time-honored precedents here, these clearly, would warrant us to invoke them.

7. *The writer of the leading opinion fell into error when he asserted that the defendants are not riparian proprietors.*

The view involved in this assertion we earnestly pressed on the argument, and our sincere conviction of its importance and truth, leads us to fear it has in the multiplicity of matters involved in the case escaped the attention of the Court. We beg leave, therefore, briefly (for we cannot here elaborate it), but most earnestly, to invite the attention of the Court to it. What your Honors have decided is, that by virtue of the certificates of purchase, the plaintiffs acquired a vested right as appurtenant to and parcel of the land described, to the flow of all those waters, but on the very principles by which you reach that conclusion that vested right is not a right in gross,—not a personal right, not an unqualified right, not an absolute right,—but, on the contrary, a right appurtenant to and running with the land, and subject and subordinate to a similar and equal right already vested in the land above on the stream, and the owners thereof to use as riparian owners a reasonable quantity of that water on and in connection with their land. Whether these upper lands are owned by individual citizens or by the Government of the United States is immaterial to our present purpose. Being an existing and vested right, the only possible question is, has it been exercised by or with the consent of the proprietor of that right.

Now, in this case, the United States being the proprietor of the right, stands in relation to it, for every purpose, just as would an individual proprietor of the same right. If, instead of the United States owning all this riparian land above, as is found in this case, the finding had been that the very same land had been prior to the issuance of the certificates of purchase vested in a patentee thereof under a Mexican grant, and that the use and appropriation defendants made of the water was made for the purpose of irrigating portions of that very land, under and in pursuance of an express grant or license from such patentee, could it be contended for one moment that such finding, taken in connection with the other finding of fact, that the use was reasonable and proper between *supra* and *infra* riparian proprietors, would not fully and fairly uphold the judgment rendered.

No difference, not even the semblance of a distinction, has ever yet in the whole course of this long discussion been pointed out, maintained, or even suggested between the case supposed and the case actually found. The only hint of an answer to the position, so far as we recollect, has been the citation of authorities to the effect that as between upper and lower riparian owners, the former cannot without the consent of the latter, by his own mere act or deed convert his right appurtenant into a right in gross, increase the the burdens as against the lower proprietor, or authorize a stranger to take or use more water than the upper proprietor was entitled to; for instance, that the upper proprietor, having the right as such to irrigate five hundred acres of land, could not by his deed to a stranger authorize that stranger to irrigate one thousand acres;

but we have heard no suggestion and found no intimation in the books of any such doctrine as that the lower proprietor can found a right of action upon the legitimate exercise of the conceded, existing and vested right of the upper proprietor, by simply alleging that it was exercised by proxy and not in person. If the government of the United States by the findings in this record had itself dug the Calloway ditch, and made the selfsame use of it that we have made, the case of the government agents sued by the plaintiffs for those acts would be identical with this case. Because, to say nothing of the many other evidences, and to say nothing of the Act of 1866, the Desert Land Act is clearly the equivalent of the most perfect license under seal which the patentee under the Mexican grant in the case above supposed could have executed.

As to how much water the government, or its grantee, or licensee can use under these conditions as against the plaintiffs, it is sufficient, in view of the facts in this record, to say that it being a case between riparian proprietors, and no damage being pretended, the question of the *quantum* cannot arise. Moreover, it is by all the authorities a question of fact, and has been found upon the evidence. Further, the right to irrigate being conceded to exist in the government, its licensee or grantee, as in any other riparian proprietor, it must follow that until the government regulates and parts with any portion of this riparian land, it all remains riparian land and can all be irrigated as such.

For these reasons we respectfully urge that a rehearing should be granted.

GARBER, THORNTON & BISHOP,
Of Counsel for Respondent.

